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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

MDL 2672 CRB (JSC)

PLAINTIFFS' NOTICE OF MOTION, MOTION, AND MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF THE BOSCH CLASS ACTION SETTLEMENT

Hearing: May 11, 2017
Time: 8:00 a.m.
Courtroom: 6, 17th floor

The Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 11, 2017, at 8:00 a.m., in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Settlement Class Counsel, on behalf of the provisionally certified Settlement Class of certain owners and lessees of Volkswagen, Audi, and Porsche branded TDI vehicles defined in the Class Action Settlement Agreement and Release (Amended) ("Settlement" or "Class Action Agreement"), will and hereby do move the Court for an Order granting final approval of the Class Action Agreement with Robert Bosch GmbH and Robert Bosch, LLC ("Bosch").

As discussed in the accompanying Memorandum and Points of Authorities, Plaintiffs and Bosch (the "Parties") have reached a final classwide resolution in this historic litigation that provides Class Members with $327.5 million in additional compensation. This fund is to be paid immediately after final approval by this Court. This compensation is above and beyond the $10.03 billion funding commitment that this Court has approved for the Volkswagen 2.0-liter Class Action Settlement (the "Volkswagen 2.0-liter Settlement" or "2.0-liter Settlement"), and the $1.26 billion that is the minimum available to pay consumers under the preliminarily approved Volkswagen 3.0-liter Class Action Settlement (the "Volkswagen 3.0-liter Settlement" or "3.0-liter Settlement") (together, "Volkswagen Settlements"). Moreover, the Notice Program ordered by the Court, which included direct mail notice, and is being coordinated with the notice program for the Volkswagen 3.0-liter Settlement, has timely commenced and is providing the best notice practicable under the circumstances. The Settlement Class Representatives and Settlement Class Counsel therefore respectfully request that the Court grant final approval to the Settlement.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its recent plea agreement with the Department of Justice ("DOJ"), Volkswagen admitted that it knowingly misled regulators and the public into believing that its TDI "clean diesel" engines met strict U.S. federal and state emission standards. Plaintiffs alleged that Bosch's role in supplying software to Volkswagen facilitated Volkswagen's scheme to deceive the United States Environmental Protection Agency ("EPA"), the California Air Resources Board ("CARB"), and other government officials into approving for sale hundreds of thousands of non-compliant Class Vehicles in the U.S. Volkswagen has since admitted wrongdoing. It recently pled guilty to conspiracy to defraud the U.S., including wire fraud, and to violating the Clean Air Act. Bosch continues to deny wrongdoing.

The Parties' Settlement creates a non-reversionary common fund worth $327.5 million. The Bosch class includes all persons and entities that were eligible for membership in the classes defined in the Volkswagen Settlements, including consumers and reseller dealers. This means that affected TDI owners and lessees will receive payments from this Settlement on top of the very significant payments they will receive from Volkswagen as a result of the Volkswagen Settlements.

Anyone who submitted, or submits in the future, an approved claim in either or both of the Volkswagen Settlements will not need to file a claim, or take any other action, to receive their Bosch Settlement Fund payment check(s). Those people—the vast majority of Class Members—will *automatically* receive their Bosch Settlement Fund payment check(s) in the mail. Those who excluded themselves from ("opted out of") either or both Volkswagen Settlements, or who otherwise did not file approved claims in those settlements, will have the opportunity to receive compensation from the Bosch Settlement Fund through a claims process.

This Settlement, together with the simultaneously-filed settlement with Volkswagen involving the 3.0-liter TDI vehicles, brings to an end the final chapter of the consumer and reseller dealer claims in the Volkswagen MDL litigation, a resolution achieved at remarkable speed. This Settlement was announced less than one-and-a-half years after the news of

Volkswagen's diesel scandal broke, one year after this Court appointed Lead Counsel and the Plaintiffs' Steering Committee ("PSC") (together, "Class Counsel"), and three months after this Court granted final approval of the Volkswagen 2.0-liter Settlement.

As with the Volkswagen Settlements, this Settlement is the result of significant efforts undertaken by Class Counsel, defense counsel, Settlement Master Mueller and his team, and the Court. Despite the remarkable pace of the litigation that resulted in the Volkswagen 2.0-liter Settlement and the announcement of the Volkswagen 3.0-liter Settlement, Class Counsel's efforts toward a resolution with Bosch continued full speed. The PSC worked tirelessly to investigate the facts, review and analyze documents, engage experts, and prepare for trial against Bosch. After many more months of intensive negotiations and litigation preparation following the Volkswagen 2.0-liter Settlement, and while the Volkswagen 3.0-liter Settlement was being negotiated, the Parties reached the Settlement, which (along with the preliminarily approved 3.0-liter Settlement for which Plaintiffs are contemporaneously seeking final approval) will conclude the consumer and reseller dealers' claims in this MDL, if approved. Class Counsel have fulfilled their commitment to the Court to personally devote their own time, and the time and resources of their respective firms, towards the litigation and resolution of this case. And Class Counsel will continue doing so.

Settlement Class Representatives and Settlement Class Counsel believe the Settlement is fair, adequate and reasonable to the Class, according to Fed. R. Civ. P. 23(e) and prevailing jurisprudence. Settlement Class Representatives and Settlement Class Counsel respectfully request this Court approve this Settlement.

II. BACKGROUND AND PROCEDURAL HISTORY

The relevant factual allegations and procedural history are set forth in large part in this Court's orders granting preliminary approval of the Volkswagen Settlements and this Bosch Settlement. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 4010049, at *1-2 (N.D. Cal. July 26, 2016); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 672727, at *1-2 (N.D. Cal. Feb. 16, 2017); *In re Volkswagen "Clean Diesel" Mktg., Sales*

Practices, & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2017 WL 672820, at *1-2 (N.D. Cal. Feb. 16, 2017).

A. Factual Background

This multidistrict litigation arises from Volkswagen's sale to the American public of TDI "clean diesel" vehicles containing a "defeat device" to the American public. 2017 WL 672727, at *1. The Volkswagen Defendants marketed the TDI vehicles to the public "as being environmentally friendly, fuel efficient, and high performing." *Id*. In fact, the vehicles contained hidden defeat devices—"software designed to cheat emissions tests and deceive federal and state regulators"—to evade emissions testing by government regulators such as the EPA and CARB. *Id*. The defeat devices, which Volkswagen developed with software supplied by Bosch, sensed when the vehicle was being tested for emissions compliance and then accordingly adjusted its output to legal levels. *Id*. Then, when testing was complete and normal driving conditions resumed, the car would "release nitrogen oxides ("NO_X") at a factor of up to 40 times over the permitted limit."[1] *Id*. (emphasis added). Volkswagen was able "to obtain Certificates of Conformity ("COCs") from EPA and Executive Orders ("EOs") from CARB for its 2.0- and 3.0-liter diesel engine vehicles" solely based on the installation of the defeat device. *Id*. Plaintiffs alleged that Bosch worked closely with Volkswagen to develop and supply the defeat device for use in Volkswagen's vehicles. *Id.* While Volkswagen has publicly admitted wrongdoing, Bosch continues to deny wrongdoing. *Id.*

B. Procedural History

On September 3, 2015, Volkswagen admitted to government regulators that it had installed a defeat device on 2009-2015 Volkswagen and Audi 2.0-liter TDI vehicles. ¶ 355.[2] On September 18, 2015, the EPA issued a Notice of Violation ("NOV") to Volkswagen, alleging the defeat device Volkswagen installed in vehicles containing 2.0-liter diesel engines violated provisions of the Clean Air Act, and CARB informed Volkswagen it had commenced an

[1] Citations, internal quotations, and footnotes omitted and emphasis added unless otherwise noted.

[2] All references to "¶" are to the Amended Consolidated Consumer Class Action Complaint ("Amended Consumer Complaint"), filed on September 2, 2016 (Dkt. No. 1804), unless otherwise noted.

enforcement investigation concerning the defeat device. ¶ 356.

On November 2, 2015, the "EPA issued a second NOV to Volkswagen, as well as Dr. Ing. h.c. F. Porsche AG and Porsche Cars North America, Inc., which alleged Volkswagen had installed in its 3.0-liter diesel engine vehicles a defeat device similar to the one described in the September 18 NOV." ¶ 366. CARB likewise sent a second letter concerning the same matter. ¶ 370. After originally denying the allegations, Volkswagen finally admitted that defeat device software was installed not only in the vehicles identified in the second NOV, but in all 3.0-liter Class Vehicles sold by Volkswagen, Audi, and Porsche. *Id.*

Following public disclosure of Volkswagen's wrongdoing, consumers filed over 500 class actions across the country. Multiple governmental entities also filed suit against Volkswagen: the DOJ filed a complaint on behalf of the EPA for violations of the Clean Air Act; the Federal Trade Commission ("FTC") filed an action for violations of the FTC Act; and California and other state attorneys general announced investigations or lawsuits.

On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions to the Northern District of California for consolidated pre-trial proceedings in the above-captioned MDL. Dkt. No. 1. The following month, the Court appointed Elizabeth J. Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP as Lead Counsel and 21 additional attorneys to the PSC, which is chaired by Ms. Cabraser. Dkt. No. 1084. The Court also appointed former FBI Director Robert S. Mueller III as Settlement Master to facilitate settlement discussions. Dkt. No. 797.

In the weeks and months that followed, a fully deployed PSC worked tirelessly to prosecute the civil cases on behalf of consumers against Volkswagen and Bosch. Lead Counsel created more than a dozen PSC working groups to ensure that the enormous amount of work that needed to be done in a very short period of time was done in the most organized and efficient manner possible. Many of these working groups, in particular the Bosch working group, were involved in investigating Bosch's alleged role in the fraud. The Bosch working group focused on all aspects of the litigation involving Bosch, including drafting the complaints, serving and reviewing voluminous discovery, reviewing and translating German-language documents,

assessing technical and engineering issues (and retaining experts concerning those issues), preparing a motion for class certification, preparing for an early trial, and researching German and European data privacy issues, among many others.

On February 22, 2016, Class Counsel filed a Consolidated Consumer Class Action Complaint alleging, among other things, that Bosch had conspired with Volkswagen to develop, install, and conceal the defeat devices in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d). Dkt. No. 1230.

Following the filing of the Complaint, Class Counsel served Bosch with extensive written discovery, including interrogatories, requests for production, and requests for admissions. Class Counsel reviewed and analyzed many millions of pages of documents relating to Bosch, which required the reviewing attorneys not only to understand the legal and technical complexities of the "defeat device" scheme, but also to master the difficulties and nuances involved when working with documents composed in German. The review of these documents enabled Class Counsel to investigate the extent of Bosch's alleged involvement in the fraud. On September 2, 2016, the PSC filed the Amended Consumer Complaint, which amplified contentions about Bosch's alleged role in the conspiracy. On October 22, 2016, the PSC served Bosch with amended discovery requests, drafted motions, and accelerated trial preparation.

Parallel to its litigation against Bosch, Class Counsel was engaged in intensive settlement talks with Volkswagen, which began immediately following the Court's appointment of Lead Counsel and the Settlement Master. However, Bosch was not a party to the Volkswagen 2.0-liter Settlement. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016). It took several more months of intensive litigation before Bosch tentatively agreed to a proposed settlement. During this time, the Parties engaged in meet and confers (both in-person and telephonically) regarding the scope of discovery and Bosch's objections to Plaintiffs' discovery requests and prepared letters to Magistrate Judge Corley to assist with the resolution of the Parties' various discovery disputes. The Parties vigorously litigated Bosch's alleged role in the fraud up until the moment a tentative agreement was announced, as evidenced by the stipulation filed by the Parties on December 2,

2016, regarding briefing on Bosch's forthcoming motions to dismiss. *See* Dkt. No. 2414.

The government agencies pursuing Volkswagen chose not to engage in litigation against Bosch. Thus, the PSC has performed all of the investigation, discovery, and trial preparation work in the case against Bosch. Those efforts ultimately will provide Settlement Class Members with the additional compensation offered by this Settlement. By any measure, this Settlement is an extraordinary result for the Settlement Class, given the difficulty of presenting Bosch's alleged involvement from ambiguous and technical documents and in the face of Bosch's significant asserted defenses.

On January 31, 2017, Plaintiffs and Settlement Class Counsel filed their Motion and Memorandum in Support of Preliminary Approval of the Bosch Class Action Settlement Agreement and Release and Approval of Class Notice ("Motion for Preliminary Approval"). Dkt. No. 2838. On February 14, 2017, the parties presented a comprehensive description of the Settlement terms, benefits and procedures at the hearing on the Motion for Preliminary Approval, and on February 16, 2016 provided the Court with the Class Action Settlement Agreement and Release (Amended) ("Settlement"). Dkt. 2918. Following the hearing, the Court entered its Order Granting Preliminary Approval of the Bosch Class Action Settlement ("Preliminary Approval Order"). *In re Volkswagen*, 2017 WL 672820. The Preliminary Approval Order provisionally certified the Settlement Class, preliminarily approved the Settlement, appointed Lead Counsel and the PSC as Settlement Class Counsel, appointed and designated the individuals listed on Exhibit 1 to the Motion for Preliminary Approval as Class Representatives, approved the manner and form of providing notice of the Settlement to Class Members, set a deadline for Class Members to opt-out from or object to the Settlement, and scheduled a final Fairness Hearing.

Following preliminary approval, Settlement Class Counsel diligently worked with respected class notice provider Epiq Systems, Inc. ("Epiq") to effectuate the Notice Program ordered by the Court. The approved Short Form Notice has been directly sent by first class mail to all readily identifiable Class Members using addresses gathered in the notice programs in the Volkswagen Settlements. Email Notice has been sent by email to the majority of class members. Epiq further disseminated notice through an extensive print and digital media program. Finally, a

Settlement Website and a toll-free telephone number were established to provide details regarding the Settlement to inquiring Class Members. Class Counsel have made themselves available to directly address questions, comments, and requests for assistance from Class Members, and have been doing so since the parties filed the Settlement documents with the Court.

III. TERMS OF THE BOSCH CLASS SETTLEMENT

The Settlement provides substantial benefit to all persons and entities who were eligible for membership in the Volkswagen Settlements.

A. The Settlement Class Definition

As mentioned above, the Settlement Class consists of all persons and entities who were eligible for membership in the classes defined in the Volkswagen Settlements, including Volkswagen Settlement Opt Outs. Therefore, the Class consists of Eligible Owners, Eligible Sellers, Eligible Former Lessees, and Eligible Lessees in the 2.0-liter Settlement, and Eligible Owners, Eligible Former Owners, Eligible Lessees, and Eligible Former Lessees in the 3.0-liter Settlement.

The following entities and individuals are excluded from the Class:

(1) Bosch's officers, directors, and employers; and Bosch's affiliates and affiliates' officers, directors, and employees;

(2) Volkswagen; Volkswagen's officers, directors, and employees; and Volkswagen's affiliates and affiliates' officers, directors, and employees;

(3) any Volkswagen Franchise Dealer;

(4) Judicial officers and their immediate family members and associated court staff assigned to this case; and

(5) All those otherwise in the Class who or which timely and properly exclude themselves from the Class as provided in the Class Action Agreement.

B. Benefits to Settlement Class Members

Bosch has agreed to make a guaranteed lump-sum payment of $327,500,000 (the "Bosch Settlement Fund") for the benefit of the Settlement Class Members. This payment includes any attorneys' fees and expenses that might be awarded by the Court. Bosch has also agreed to pay

all reasonable and necessary fees and costs of the Notice Administrator and Claims Administrator incurred with providing notice under, and for the administration of, the Class Action Settlement Agreement.

The Bosch Settlement Fund will be allocated among Settlement Class Members pursuant to the following plan of distribution developed by the FTC[3]:

(1) Individuals and entities eligible to participate in the 2.0-liter Settlement will receive a total of $163,267,450, to be shared among 2.0-liter Settlement class members as set forth below; and

(2) Individuals and entities eligible to participate in the 3.0-liter Settlement will receive a total of $113,264,400, to be shared among 3.0-liter Settlement class members, as set forth below.

The Bosch Settlement funds will be allocated to individual Settlement Class Members as follows:

(1) An Eligible Owner of an Eligible Vehicle in the 2.0-liter Settlement will receive $350, except that if an Eligible Seller has identified himself or herself and filed an approved claim for the Eligible Vehicle, or if an Eligible Lessee has identified himself or herself and filed an approved claim for the Eligible Vehicle, the Eligible Owner will receive $175;

(2) An Eligible Seller in the 2.0-liter Settlement who has identified himself or herself and filed an approved claim will receive $175;

(3) An Eligible Lessee in the 2.0-liter Settlement will receive $200;

(4) An Eligible Owner of an Eligible Vehicle in the 3.0-liter Settlement will receive $1,500, with three exceptions:

(a) If an Eligible Former Owner has identified himself or herself and filed an approved claim for the Eligible Vehicle in the 3.0-liter Settlement, the $1,500 payment will be split equally ($750 each) between the Eligible Owner and the Eligible Seller;

[3] The FTC is an independent government agency whose mission is to prevent business practices that are anticompetitive, or deceptive or unfair to consumers. Acting as an independent third party to the litigation between the PSC and Bosch, the FTC's counsel met with Bosch and directed an allocation of the Bosch Settlement fund among members of the Bosch Settlement Class that the FTC's counsel would recommend that the FTC accept.

(b) An Eligible Owner will also receive $750 if an Eligible Former Lessee has identified himself or herself and filed an approved claim for the Eligible Vehicle in the 3.0-liter Settlement; and

(c) If two Eligible Former Owners have identified themselves and filed approved claims for the Eligible Vehicle in the 3.0-liter Settlement, the $1,500 will be split among the Eligible Owner and the two Eligible Former Owners, with $750 going to the Eligible Owner and $375 each to the two Eligible Former Owners.

(5) An Eligible Lessee in the 3.0-liter Settlement will receive $1,200.

The above payments are net payments to Settlement Class Members and will not be reduced by any amount of attorneys' fees or expenses that might be awarded by the Court. Payments to Settlement Class Members will begin after entry of an order granting final approval to the Settlement, and will be distributed over the course of the Claim Period. If any funds remain, and it is not feasible and/or economically reasonable to distribute the remaining funds to Class Members, those funds shall be distributed through Court-approved cy pres payments according to a distribution plan and schedule filed by Class Counsel and approved by the Court.

Payments to Class Members will not be held up pending any appeals; they will begin as soon as practicable after final approval by this Court.

C. Attorneys' Fees

Contemporaneous with the filing of this motion, Class Counsel has moved this Court under Rule 23(h) for an award of attorneys' fees of $51,000,000 and reimbursement of costs and expenses incurred with the action in the amount of $1,000,000. The combined fees and costs amount to less than sixteen percent (16%) of the total common fund. If approved, both amounts requested will be paid from the Bosch Settlement Fund. The Parties did not discuss attorneys' fees and costs prior to agreement on all material terms of the Class Action Agreement.

IV. THE BOSCH SETTLEMENT MERITS FINAL APPROVAL

A. The Class Action Settlement Process

Pursuant to Federal Rule of Civil Procedure 23(e), class actions "may be settled, voluntarily dismissed, or compromised only with the court's approval." As a matter of "express

public policy," federal courts favor and encourage settlements, particularly in class actions, where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (same); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11:41 (4th ed. 2002) (same, collecting cases).

The *Manual for Complex Litigation* describes the three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of the notice of the settlement to class members, providing for, among other things, a period for potential objectors and dissenters to raise challenges to the settlement's reasonableness; and (3) a formal fairness and final settlement approval hearing. *Manual for Complex Litigation (Fourth)* at § 21.63 (2004). The Court completed the first step in the settlement process when it granted preliminary approval to the Settlement. Thereafter, Settlement Class Counsel completed the second step by implementing the Notice Program pursuant to the terms of the Settlement and the Court's Preliminary Approval Order. Settlement Class Representatives and Settlement Class Counsel now request that the Court take the third and final step—holding a formal fairness hearing and granting final approval of the Settlement. Settlement Class Representatives and Settlement Class Counsel further request that the Court confirm certification of the Settlement Class and enter a Final Judgment in this action.

B. The Settlement Meets the Ninth Circuit's Standards for Final Approval.

Federal Rule of Civil Procedure 23 governs a district court's analysis of the fairness of a class action settlement. *See* Fed. R. Civ. P. 23(e). To approve a class action settlement, the Court must determine whether the settlement is "fundamentally fair, adequate and reasonable." *In re Rambus Inc. Derivative Litig.*, No. C-06-3515–JF, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009) (citing Fed. R. Civ. P. 23(e)); *see also Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). In granting preliminary approval of the Settlement, the Court took the first step in making this

determination. *See In re Volkswagen*, 2017 WL 672820, at *13 ("The Court finds that the proposed Settlement is the result of intensive, non-collusive negotiations and is reasonable, fair, and adequate."). "Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). When class counsel is experienced and supports the settlement, and the agreement was reached after arm's-length negotiations, courts should give a presumption of fairness to the settlement. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *6 (N.D. Cal. June 29, 2009); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Additionally, "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

The Ninth Circuit has identified "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement" as factors for determining whether a settlement is fair, reasonable, and adequate. *See Hanlon*, 150 F.3d at 1026. "The relative degree of importance to be attached to any particular factor will depend on the unique circumstances of each case." *Officers for Justice*, 688 F.2d at 625. As discussed below, all of the relevant factors set forth by the Ninth Circuit for evaluating the fairness of a settlement at the final stage support final approval, and there can be no reasonable doubt that the Settlement was reached in a procedurally fair manner given Settlement Master Mueller's ongoing guidance and assistance. For these reasons, the Settlement merits final approval.

C. The Settlement Is Substantively Fair Because it Provides Significant Benefits in Exchange for the Compromise of Plaintiffs' Claims.

As noted in the summary of the Settlement terms above, and in the Settlement itself, the Settlement compensates Class Members for their losses as a result of Bosch's alleged participation in the scheme to defraud. All PSC members, a uniquely experienced group including preeminent class action litigators, consumer and environmental advocates, noted trial lawyers, and auto litigation veterans, support this Settlement.

This was a difficult case from the start, and, as described above, it is not at all certain that the Class could obtain a better outcome against Bosch through continued litigation, trial, and appeal—much less at the speed at which it was accomplished through the Settlement. Indeed, the litigation thus far has revealed very significant disputes on a number of factual and legal issues necessary for Plaintiffs to prevail.

As to the facts, unlike Volkswagen, Bosch never came close to even arguably conceding any element of liability. Indeed, Plaintiffs and Bosch have advanced competing narratives about a number of key documents underpinning Plaintiffs' case. For example, while Plaintiffs assert that one particular document is strong evidence that Bosch knew about and participated in Volkswagen's defeat device scheme, Bosch claims that document does not implicate the EDC-17 engine software that Plaintiffs allege contained the defeat device and does not concern diesel vehicles at all. Similarly, Plaintiffs assert that another document regarding the "acoustic function" (a euphemism sometimes used to reference the defeat device) reflects conversations between Volkswagen's CEO and Bosch GmbH's CEO about the critical issues in this case, demonstrating Bosch's knowledge of, complicity with, and participation in the defeat device scheme. Bosch vigorously disputes this interpretation, arguing instead that the document refers only to diesel vehicle acoustics. Thus, while Plaintiffs continue to believe strongly in the allegations in their Complaints, the proof underlying those allegations was hotly contested, and Plaintiffs' ultimate success at trial was far from certain.

The case presented considerable legal hurdles as well. Plaintiffs' principal claim against Bosch was brought under the RICO statute. But, even assuming the absence of factual disputes,

prevailing on that claim was no gimme. In fact, Bosch recently briefed a motion to dismiss a similar RICO claim brought by the non-settling Volkswagen Franchise Dealers. That briefing outlines some of the potential legal obstacles to the consumer and reseller dealers' RICO claim, including challenges to standing, causation, and damages, among other things. Dkt. Nos. 2864, 3052. Moreover, Bosch GmbH, a German company, challenged the Court's exercise of jurisdiction—an argument which, if correct, would significantly impair Plaintiffs' claims. Bosch was prepared to aggressively defend itself, and was not without the legal means to do so.

While Settlement Class Counsel believe in the strength of the case against Bosch, they also recognize there are always uncertainties in litigation, which weigh in favor of a compromise in exchange for certain and timely provision to the Settlement Class of the significant benefits described herein. *See Nobles*, 2009 WL 1854965, at *2 ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.") (citing *Mego*, 213 F.3d at 458; *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *15 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.")).

Because Class Members will have received substantial compensation through the Volkswagen settlements for the economic losses associated with the defeat device scheme, moreover, there was a risk that any potential recovery would have been offset, partially or entirely, by the funds Class Members already received. Even if the Class secured an additional judgment against Bosch, Bosch maintained that it was indemnified by Volkswagen for any liability arising from the defeat devices. The Volkswagen settlements, in turn, provide that if that indemnification claim succeeded, Class Members would "waive enforcement of [their] judgment against . . . Bosch . . . by the amount of the damages that [Volkswagen is] . . . held to be responsible for by way of indemnification of . . . Bosch." Dkt. No. 1685-5 ¶ 6. Furthermore, while treble damages were potentially available under Plaintiffs' RICO claim, "it is inappropriate to measure the adequacy of a settlement amount by comparing it to a possible trebled base recovery figure." *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1324 (2d Cir.

1990).

Finally, even if Settlement Class Counsel prosecuted these claims against Bosch to conclusion, and recovered additional funds for the Class, that recovery would likely come years in the future and at far greater expense to the Settlement Class. And, as outlined above, despite Settlement Class Counsel's belief in the merit of its claims, there is also a risk that a litigation Class would receive less or nothing at all, not only because of the risks of litigation, but also because of the solvency risks such prolonged and expanding litigation could impose upon Bosch. A judgment that bankrupts Bosch would be far less satisfying than a settlement that provides meaningful and certain monetary and restorative relief now. *See, e.g.*, *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (affirming approval of settlement class and rejecting objections premised on prospect of plaintiffs complete victory on disputed issue because "any such victory would run the risk of being a Pyrrhic one . . . we need not embellish the point by raising the prospect of bankruptcy"). As recognized by the Court in its order granting final approval of the 2.0-liter Settlement, "[w]eighing this possibility against the immediate and guaranteed benefits provided by the Settlement, settlement is clearly favored." *In re Volkswagen*, 2016 WL 6248426, at *18.

D. The Settlement Is Procedurally Fair as the Product of Good Faith, Informed, and Arm's-Length Negotiations.

Lead Counsel and Class Counsel engaged in intensive settlement discussions with Bosch and government representatives under Settlement Master Mueller's guidance and supervision. Class Counsel analyzed voluminous discovery material that provided them with sufficient information to enter into a reasoned and well-informed settlement. *See In re Volkswagen*, 2017 WL 672820, at *10 (holding that Class Counsel's review of discovery "allowed them to make a well-informed assessment of the merits of the Class' claims and to determine whether [Bosch's] offers adequately compensates Class Members for their injuries"); *see also In re Volkswagen*, 2016 WL 4010049, at *14 (same as to Volkswagen's offers); *Mego*, 213 F.3d at 459 (holding "significant investigation, discovery and research" supported "district court's conclusion that the Plaintiffs had sufficient information to make an informed decision about the Settlement").

Here, the Parties' settlement negotiations were conducted in good faith at all times, and

"[t]he Settlement is [] the result of arm's-length negotiations by experienced Class Counsel." *In re Volkswagen*, 2017 WL 672820, at *10. In a separately-filed Declaration, Settlement Master Mueller, who oversaw and facilitated the negotiation of the Settlement, confirmed the Settlement "is the product of good faith, multi-dimensional negotiations among the parties." Declaration of Robert Mueller, III ("Mueller Decl.") ¶ 8.

Participation of government entities in the settlement process also weighs highly in favor of granting final approval. *See In re Volkswagen*, 2017 WL 672727, at *16; *see also In re Volkswagen*, 2016 WL 6248426, at *14; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration.") (citation omitted); *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (E.D.N.Y. 1982) ("That a government agency participated in successful compromise negotiations and endorsed their results is a factor weighing heavily in favor of settlement approval—at least where, as here, the agency is 'committed to the protection of the public interest.'") (citation omitted). Here, the FTC conducted an independent analysis of the claims against Bosch and was involved both in the allocation process and in discussing, drafting, circulating, and revising the various documents that made up the Bosch Settlement. *See* Mueller Decl. ¶ 6.

A settlement process involving protracted negotiations with the assistance of a court-appointed mediator weighs in favor of granting final approval. *See Pha v. Yang*, No. 2:12-cv-01580-TLN-DAD, 2015 U.S. Dist. LEXIS 109074, at *13 (E.D. Cal. Aug. 17, 2015) (finding that the fact "the settlement was reached through an arms-length negotiation with the assistance of a mediator through a months-long process . . . weigh[ed] in favor of approval"); *Rosales v. El Rancho Farms*, No. 1:09-cv-00707-AWI-JLT, 2015 WL 446091, at *44 (E.D. Cal. July 21, 2015) ("Notably, the Ninth Circuit has determined the 'presence of a neutral mediator [is] a factor weighing in favor of a finding of non-collusiveness.'") (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *15-16 (N.D. Cal. Sept. 26, 2013) (same). As the Court recognized

in its Preliminary Approval Order, "the parties negotiated the Settlement under the supervision of the court-appointed Settlement Master" and "Class Counsel negotiated the Settlement alongside government entities, including the EPA and the FTC." *In re Volkswagen*, 2017 WL 6728280, at *10. It is an understatement to say that the parties benefited from the assistance of Settlement Master Mueller, who played a crucial role in supervising the negotiations and in helping the parties bridge their differences in order to reach this Settlement. *See id*. (finding that "the Settlement Master's guidance coupled with informed dialogues and the intensive involvement of government entities suggests the parties reached the Settlement after serious informed, non-collusive negotiations").

Taken together, the benefits provided to the Settlement Class Members and the procedurally fair manner in which it was reached weigh in favor of granting final approval.

E. Class Member Reaction to the Settlement Has Been Favorable.

The deadline for Class Member objections and opt-outs is April 14, 2017, and any objections will be comprehensively analyzed, reported on, and responded to, in Settlement Class Counsel's Reply Submissions, to be filed on April 28, 2017.

In the meantime, the immediate reaction of Class Members to the proposed Settlement has been overwhelmingly positive. As detailed in Section VI below, direct mail and e-mail notice has been accomplished. Over 1,804,803 notices were sent directly via First Class U.S. Mail and e-mail to ensure reaching virtually all Class Members. Although the Opt-Out and Objection Deadlines have not yet passed, approximately eight consumers have requested exclusion from the Settlement Class (though their compliance with the Settlement's opt-out criteria has not yet been verified) and approximately two objections have been received. Collectively, these numbers represent less than 0.002% of the total Settlement Class. These figures provide evidence of the Settlement's fairness. *See In re Volkswagen*, 2016 WL 6248426, at *16 (noting that out of the approximately 490,000 class members in the 2.0-liter Settlement only 0.7% opted out and 0.09% timely objected, and holding that "[g]iven the high claim rate and the low opt-out and objection rates, this factor strongly favors final approval"); *see also Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement with 45 objections and 500 opt-outs

from class of 90,000 members, roughly 0.6%); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (finding that sixteen opt outs in class of 329 members, or 4.86%, strongly supported settlement); *Glass v. UBS Fin. Serv., Inc.*, No. C-06-4068-MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (approving settlement with 2% opt-out rate); *Wren v. RGIS Inventory Specialists*, No. C-06-05778-JCS, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011) (holding that "'the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members'") (quoting *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *see also Garner v. State Farm Mut. Auto. Ins. Co.*, No. C 08 1365 CW (EMC), 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010); *Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *5 (D. Nev. Oct. 28, 2010) ("The small number of objections is an indication that the settlement is fair, adequate, and reasonable.").

V. THE COURT SHOULD CONFIRM THE CERTIFICATION OF THE BOSCH SETTLEMENT CLASS.

Federal Rule of Civil Procedure 23 governs the issue of class certification, whether the proposed class is a litigated class or a settlement class. When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there will be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

Class certification is appropriate where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Certification of a class seeking monetary compensation also requires a showing that "questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Pursuant to the Preliminary Approval Order, the Court certified the Class defined in

paragraph 2.7 of the Class Action Agreement for settlement purposes. *In re Volkswagen*, 2017 WL 672820, at *6-9. In doing so, the Court found that the Settlement Class Representatives satisfied both Rule 23(a) and (b)(3) requirements, and that Settlement Class Counsel were adequate representatives of the Class. The Class certified by the Court is substantially similar to the class of owners and lessees of Volkswagen and Audi branded TDI vehicles that was certified in the context of the 2.0-liter Settlement. *See In re Volkswagen*, 2016 WL 6248426, at *6-7 (adopting the certification analysis at the preliminary approval stage and granting final class certification). And as the Class definition has not changed since preliminary approval, there is no reason for the Court to depart from its previous conclusion that certification of the Class is warranted.

A. The Class Meets the Requirements of Rule 23(a).

1. The Class Is Sufficiently Numerous.

Rule 23(a)(1) is satisfied when "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is generally satisfied when the class exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000).

As previously recognized by the Court, "[t]he numerosity requirement is easily satisfied here." *In re Volkswagen*, 2017 WL 672820, at *10 ("There were over 500,000 Eligible Vehicles sold or leased to consumers in the United States, and thus hundreds of thousands of potential Class Members."). The large size of the Class and the geographic dispersal of its members across the United States render joinder impracticable. *See id.* ("Rule 23(a)(1) is met because joinder is impossible."); *see also In re Volkswagen*, 2016 WL 4010049, at *10 (finding numerosity satisfied in context of the 2.0-liter Settlement "because joinder is impractical"); *see Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical.").

2. There Are Common Questions of Both Law and Fact.

Further, common questions of law and fact apply to each of the Class Member's claims. "Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City &*

Cty. of San Francisco, 749 F.3d 1107, 1111 (9th Cir. 2014). The "commonality requirement has been 'construed permissively,' and its requirements deemed 'minimal.'" *Estrella v. Freedom Fin'l Network*, No. C 09-03156 SI, 2010 WL 2231790, at *25 (N.D. Cal. June 2, 2010) (quoting *Hanlon*, 150 F.3d at 1020). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. Assessing commonality requires "a precise understanding of the nature of the underlying claims." *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013)). This allows courts to determine if the class' "claims . . . depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The commonality "analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015). Indeed, "'[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement." *Dukes*, 564 U.S. at 369.

Courts routinely find commonality where the class' claims arise from a defendant's uniform course of conduct. *See, e.g.*, *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) ("The Court finds that the class members' claims derive from a common core of salient facts, and share many common legal issues. These factual and legal issues include the questions of whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO statute. The commonality requirement of Rule 23(a)(2) is met."); *Cohen v. Trump*, 303 F.R.D. 376, 382 (S.D. Cal. 2014) ("Here, Plaintiff argues his RICO claim raises common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class Members alike.' The Court agrees."); *Spalding v. City of Oakland*, No. C11-2867 TEH, 2012 WL 994644, at *8 (N.D. Cal. Mar. 23, 2012) (commonality found where plaintiffs "allege[] a common course of conduct that is amenable to classwide resolution");

Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983) ("commonality requirement is satisfied where it is alleged that the defendants have acted in a uniform manner with respect to the class"); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (finding that "where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question").

Here, Class Members' "claims arise from Volkswagen's and Bosch's common course of conduct." *In re Volkswagen*, 2017 WL 672820, at *6; *see also In re Volkswagen*, 2016 WL 4010049, at *10 (finding class members' "claims arise from Volkswagen's common course of conduct" in context of 2.0-liter Settlement). Indeed, Plaintiffs allege that "the common questions of fact relate to Bosch's involvement in Volkswagen's fraudulent scheme to deceive state and federal regulatory authorities by installing in 2.0- and 3.0-liter diesel engine vehicles the designed defeat device." *In re Volkswagen*, 2017 WL 672820, at *6; *see also In re Volkswagen*, 2016 WL 4010049, at *10 (finding common questions of fact to include "Volkswagen's fraudulent scheme to deceive state and federal regulatory authorities by installing in its 2.0-liter diesel engine vehicles the defeat device designed"). Bosch's alleged common course of conduct raises common questions of law and fact, the resolution of which will generate common answers "apt to drive the resolution of the litigation" for the Settlement Class as a whole. *Dukes*, 564 U.S. at 350. And as Plaintiffs allege that the Class's "injuries derive from [Bosch's] alleged 'unitary course of conduct,'" they have "'identified a unifying thread that warrants class treatment.'" *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 290 (S.D.N.Y. 2012).

As this Court recognized when granting preliminary approval, "[w]ithout class certification, individual Class Members would be forced to separately litigate the same issues of law and fact which arise from Bosch's involvement in Volkswagen's use of the defeat device and from Volkswagen's and Bosch's alleged common course of conduct." *In re Volkswagen*, 2017 WL 672820, at *6 (citing *In re Celera Corp. Sec. Litig.*, No. 5:10-CV-02604-EJD, 2014 WL 722408, at *3 (N.D. Cal. Feb. 25, 2014) (finding commonality met where plaintiffs raised questions of law or fact that would be addressed by other putative class members pursuing similar claims)). The same was true with the classes in the context of the Volkswagen Settlements. *See*

In re Volkswagen, 2017 WL 672727, at *13; *In re Volkswagen*, 2016 WL 4010049, at *10. Accordingly, commonality is satisfied here.

3. The Settlement Class Representatives' Claims Are Typical of Other Class Members' Claims.

The proposed Settlement Class Representatives' claims are also typical of other Settlement Class Members' claims. They include both owners and lessees of 2.0-liter and 3.0-liter Eligible Vehicles. "Rule 23(a)(3) requires that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d at 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1020). "The test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Accordingly, the typicality requirement "assure[s] that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon* , 976 F.2d at 508). Thus, where a plaintiff suffered a similar injury and other class members were injured by the same course of conduct, typicality is satisfied. *See Parsons*, 754 F.3d at 685.

Here, the same course of conduct that injured Settlement Class Representatives also injured other Class Members. Indeed, as the Court found when granting preliminary approval, "[t]he Settlement Class Representatives' claims are based on the same pattern of Volkswagen's and Bosch's wrongdoing as those brought on behalf of Class Members." *In re Volkswagen*, 2017 WL 672820, at *7. "The Settlement Class Representatives, as well as Class Members, purchased or leased an Eligible Vehicle equipped with a defeat device." *Id.* Thus, "[t]heir claims are typical because they were subject to the same conduct as other Class Members, and as a result of that

conduct, the Settlement Class Representatives and Class Members suffered the same injury." *Id.* The Settlement Class Representatives, like other Class Members, would not have purchased or leased their vehicles had the illegal defeat devices been disclosed because the Eligible Vehicles would not have been approved for sale or lease in the U.S. in the first place. Finally, the Settlement Class Representatives and the other Class Members will similarly—and equitably—benefit from the relief provided by the Settlement.

Accordingly, Rule 23's typicality requirement is satisfied here. *See In re Volkswagen*, 2016 WL 4010049, at *11 (finding typicality satisfied in context of the 2.0-liter Settlement).

4. The Settlement Class Representatives and Settlement Class Counsel Fairly and Adequately Protect the Interests of the Settlement Class.

Adequacy of representation is met. Rule 23(a)(4) requires "the representative parties [to] adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is rooted in due-process concerns—'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (quoting *Hanlon*, 150 F.3d at 1020). Courts engage in a two-prong inquiry: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at 1020). Here, as with the Volkswagen Settlements, the answer to question one is no, and the answer to question two is a resounding yes. *See In re Volkswagen*, 2017 WL 672820, at *7 ("First, nothing in the record suggests the Settlement Class Representatives or Class Counsel have any conflicts of interests with other potential Class Members. . . . Second, the Court is satisfied that the Settlement Class Representatives and Class Counsel have and will continue to vigorously prosecute the action on behalf of the class."); *See In re Volkswagen*, 2017 WL 672727, at *13 (holding same in the context of 3.0-liter Settlement); *See In re Volkswagen*, 2016 WL 4010049, at *11 (holding same in the context of 2.0-liter Settlement).

a. The Interests of the Settlement Class Representatives Are Directly Aligned with those of the Absent Class Members and the Settlement Class Representatives Have Diligently Pursued the Action on Their Behalf.

The Settlement Class Representatives do not have any interests antagonistic to the other Class Members and will continue to vigorously protect their interests, as they have for the past year. *See Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 WL 1461944, at *3 (N.D. Cal. April 14, 2016). Indeed, as the Court previously noted:

> "[T]he Settlement Class Representatives affirm they 'and Class Members are entirely aligned in their interest in proving that Volkswagen misled them and share the common goal of obtaining redress for their injuries.' The Court finds no reason to believe otherwise."

In re Volkswagen, 2017 WL 672820, at *7 (quoting *In re Volkswagen*, 2016 WL 4010049, at *11).

As in the Volkswagen Settlements, the Settlement Class Representatives here understand their duties as class representatives, have agreed to consider the interests of absent Settlement Class Members, and have actively participated in this litigation. *See id.*; *see also Trosper v. Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *43 (N.D. Cal. Aug. 21, 2014) ("All that is necessary is a rudimentary understanding of the present action and . . . a demonstrated willingness to assist counsel in the prosecution of the litigation."). Here, for example, the Settlement Class Representatives have provided factual information pertaining to their purchase or lease of an Eligible Vehicle in order to assist in drafting the complaints in this litigation. *In re Volkswagen*, 2017 WL 672820, at *7. The Settlement Class Representatives have searched for, and provided, relevant documents and information to their counsel, and have assisted in preparing discovery responses and completing comprehensive fact sheets. *Id.* Moreover, the Settlement Class Representatives have regularly communicated with their counsel regarding various issues pertaining to this case, including the terms and process of the proposed Settlement, and they will continue to do so until the Settlement is approved and its administration completed. *Id.* All of this together is more than sufficient to meet the adequacy requirement of Rule 23(a)(4). *See id.*

b. Settlement Class Counsel Are Adequate Representatives of the Settlement Class.

Rule 23(g) requires this Court to appoint class counsel to represent the Settlement Class. *See* Fed. R. Civ. P. 23(g). At the outset of the MDL, as part of a competitive application process before the Court, Lead Counsel and each member of the PSC established, and the Court recognized, their qualifications, experience, and commitment to the successful prosecution of this MDL. Importantly, the criteria that the Court considered in appointing Lead Counsel and the PSC was substantially similar to the considerations set forth in Rule 23(g). *Compare* Dkt. Nos. 336 and 1084, *with Clemens*, 2016 WL 1461944, at *3. In its Preliminary Approval Order, the Court held "there were no doubts regarding Class Counsel's adequacy," and repeated its holding from the 2.0-liter Settlement:

> The Court appointed Lead Plaintiffs' Counsel and the 21 PSC members after a competitive application process, during which the Court received approximately 150 applications. They are qualified attorneys with extensive experience in consumer class action litigation and other complex cases. The extensive efforts undertaken thus far in this matter are indicative of Lead Plaintiffs' Counsel's and the PSC's ability to prosecute this action vigorously. The Court therefore finds the Settlement Class Representatives and Class Counsel are adequate representatives.

In re Volkswagen, 2017 WL 672820, at *8 (quoting *In re Volkswagen*, 2016 WL 4010049 at *11); *see also* 12/22/16, Status Conf. Tr. at 14:7-22 (Dkt. No. 2757) ("I am well aware of the extraordinary effort that the lawyers for all the parties have put into this. . . . Lawyers have families. Lawyers have other obligations. Lawyers have lives. And they have sort of taken all of that, put it to the side, and worked on this task of resolving this issue because of the serious environmental concerns that were raised by this litigation."); 5/24/16 Status Conf. Tr. at 8:6-14 (Dkt. No. 1535) ("I have been advised by the Settlement Master that all of you have devoted substantial efforts, weekends, nights, and days, and perhaps at sacrifice to your family.").

The Court need look no further than the significant benefits already obtained for the Class through Class Counsel's zealous and efficient prosecution of this action, and their ongoing efforts on behalf of the TDI consumers. Accordingly, as this Court previously found, Class Counsel are qualified and adequate to represent the interests of the instant Settlement. *See In re Volkswagen*, 2017 WL 672820, at *7-8; *see also In re Volkswagen*, 2017 WL 672727, at *14 (appointing Lead

Counsel and the PSC as Settlement Counsel in the context of 3.0-liter Settlement); *In re Volkswagen*, 2016 WL 6248426, at *28 (confirming appointment of Lead Counsel and the PSC as Settlement Counsel in the context of 2.0-liter Settlement).

B. The Requirements of Rule 23(b)(3) Are Met.

In addition to the requirements of Rule 23(a), the Court must also find that of Rule 23(b)'s requirements are satisfied. A Rule 23(b)(3) class may be certified where, as here: (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Both requirements are met.

1. Common Issues of Law and Fact Predominate.

First, common questions of law and fact predominate over any individual questions. "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:49 at 195-96 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Prac. & Proc. § 1778, at 123-24 (3d ed. 2005)). Instead, at its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

The Ninth Circuit favors class treatment of fraud claims stemming from a "common course of conduct," like the scheme alleged here. *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006); *Hanlon*, 150 F.3d at 1022-1023. Even outside of the settlement context, predominance is readily met in cases asserting RICO and consumer claims arising from a

fraudulent scheme that injured each plaintiff. *See Amchem Prods.*, 521 U.S. at 625; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173, 1176 (9th Cir. 2010) (consumer claims based on uniform omissions are readily certifiable where the claims are "susceptible to proof by generalized evidence," even if individualized issues remain); *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTx), 2009 WL 2711956, at *22-23 (C.D. Cal. Aug. 25, 2009) ("Common issues frequently predominate in RICO actions that allege injury as a result of a single fraudulent scheme."); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1256, 1257 (11th Cir. 2004) (upholding class certification of RICO claim where "all of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs . . . [and the] "corporate policies [at issue] . . . constitute[d] the very heart of the plaintiffs' RICO claims").[4]

Here, too, questions of law or fact common to the claims of the Class Members predominate over any questions affecting only individual members. As the Court found in its Preliminary Approval Order, "Plaintiffs allege that Bosch and Volkswagen perpetrated the same fraud in the same manner against all Class Members. If the Court were to find that Bosch and Volkswagen have indeed engaged in a deceptive and fraudulent scheme, such a finding would

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[4] The Rule 23(b)(3) predominance inquiry in the context of the certification of a nationwide settlement class involving various state consumer protection law claims was the subject of an extensive *en banc* decision by the Third Circuit in *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011). In affirming certification of a nationwide settlement class, the Third Circuit's predominance inquiry was informed by "three guideposts": (1) "commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"; (2) "variations in state law do not necessarily defeat predominance"; and (3) "concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class." *Sullivan*, 667 F.3d at 297.

This Court recently adopted the rationale in *Sullivan*, foreshadowed by the Ninth Circuit in *Hanlon*, that "state law variations are largely 'irrelevant to certification of a settlement class.'" *Id.* at 304 (quoting *Sullivan*, 667 F.3d at 304); *see Wakefield v. Wells Fargo & Co.*, No. C 12-05053 LB, 2014 WL 7240339, at *12-13 (N.D. Cal. Dec. 18, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2016 WL 721680, at *14-15 (N.D. Cal. Jan. 28, 2016), *report & recommendation adopted*, 2016 WL 3648478 (N.D. Cal. July 7, 2016). Moreover, in the settlement context, the Court need not "differentiate[e] within a class based on the strength or weakness of the theories of recovery." *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *20 (N.D. Cal. May 26, 2015) (quoting *Sullivan*, 667 F.3d at 328); *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL 988992, at *54-56 (N.D. Cal. Mar. 9, 2014) (citing *Sullivan*, 667 F.3d at 304-07). Here, like in *Sullivan*, any material variations in state law do not preclude a finding of predominance, given the uniformity of Bosch's alleged conduct in the scheme and common course of conduct.

apply to all of the Class Members' claims." *In re Volkswagen*, 2017 WL 672820, at *8; *see In re Volkswagen*, 2017 WL 672727, at *14 (finding same as to plaintiffs' claims against Volkswagen in the context of the 3.0-liter Settlement); *In re Volkswagen*, 2016 WL 4010049, at *12 (finding same as to plaintiffs' claims against Volkswagen in the context of the 2.0-liter Settlement); *see also* ¶¶ 238-296. "Plaintiffs also allege a common and unifying injury, as their and other Class Members' injuries arise solely from Bosch's and Volkswagen's use of the defeat device." *In re Volkswagen*, 2017 WL 672820, at *8. As in the Volkswagen Settlements, here too, Plaintiffs satisfy the predominance requirement. *See In re Volkswagen*, 2017 WL 672727, at *14 (finding predominance met in the context of 3.0-liter Settlement); *In re Volkswagen*, 2016 WL 4010049, at *12 (finding same in the context of 2.0-liter Settlement).

2. Class Treatment Is Superior in This Case.

Finally, class treatment is superior. Pursuant to Rule 23(b)(3), a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This factor "requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. In other words, it "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin*, 617 F.3d at 1175-76. Under Rule 23, "the Court evaluates whether a class action is a superior method of adjudicating plaintiff's claims by evaluating four factors: '(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.'" *Trosper*, 2014 WL 4145448, at *17 (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

There can be little doubt that class treatment here is superior to the litigation of thousands of individual consumer actions. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for

recovery." *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."). The damages sought by each Class Member here, while related to an important purchase, are not so large as to weigh against certification of a class action. *See Smith v. Cardinal Logistics Mgmt. Corp.*, No. 07-2104 SC, 2008 WL 4156364, at *32-33 (N.D. Cal. Sept. 5, 2008) (class members had a small interest in personally controlling the litigation even where the average amount of damages were $25,000-$30,000 per year of work); *see also Walker v. Life Ins. Co. of the Sw.*, No. CV 10-9198 JVS (RNBx), 2012 WL 7170602, at *16 (C.D. Cal. Nov. 9, 2012) (finding that each class member did not have "a greater interest in pursuing individual claims," even though it was "not the typical case of thousands of class members with very low amounts in controversy").

The sheer number of separate trials that would otherwise be required also weighs in favor of certification. Indeed, "[i]f Class Members were to bring individual lawsuits against Bosch, each Member would be required to prove the same wrongful conduct to establish liability and thus would offer the same evidence." *In re Volkswagen*, 2017 WL 672820, at *8. "Given that Class Members number in the hundreds of thousands, there is the potential for just as many lawsuits with the possibility of inconsistent rulings and results." *Id.* "Thus, classwide resolution of their claims is clearly favored over other means of adjudication, and the proposed Settlement resolves Class Members' claims at all once." *Id.*

Moreover, all private federal actions seeking relief for the Class have already been transferred to this District for consolidated MDL pretrial proceedings. Dkt. No. 950. That the Judicial Panel on Multidistrict Litigation consolidated all related federal consumer cases in an MDL before this Court is a clear indication that a single proceeding is preferable to a multiplicity of individual lawsuits. The government suits concerning Volkswagen emissions are pending as part of this MDL too, enabling this Court to approve and enforce all of the provisions of each of these settlements. The certification of the Settlement Class enables and completes this advantageous unified jurisdiction. For these reasons, "class action treatment is superior to other methods and will efficiently and fairly resolve the controversy." *In re Volkswagen*, 2017 WL

672820, at *8; *see In re Volkswagen*, 2017 WL 672727, at *14 (finding superiority satisfied in context of 3.0-liter Settlement); *see also In re Volkswagen*, 2016 WL 4010049, at *12 (finding superiority satisfied in context of 2.0-liter Settlement).

Finally, the Class is defined by objective, transactional facts—the purchase or lease of an Eligible Vehicle—and there is no dispute that Class Members can easily be identified by reference to the books and records of Volkswagen and their dealers. Accordingly, to the extent required, the Class is readily ascertainable. *See Moreno v. Autozone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (Breyer, J.) ("A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.").

Because the class action mechanism provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, final approval of the Court's certification of the Settlement Class is appropriate. *See In re Volkswagen*, 2017 WL 672820, at *9 (certifying the Settlement Class for settlement purposes); *see also In re Volkswagen*, 2016 WL 4010049, at *12 (finding plaintiffs satisfied the Rule 23(a) and (b)(3) requirements and confirming certification of the class in the context of 2.0-liter Settlement).

VI. THE APPROVED NOTICE PROGRAM GAVE THE BEST PRACTICABLE NOTICE TO CLASS MEMBERS AND SATISFIED RULE 23 AND DUE PROCESS.

In its Preliminary Approval Order, the Court held that "the Notice Plan is adequate" because "it provides the best practicable notice that is reasonably calculated to inform Class Members of this Settlement." *In re Volkswagen*, 2017 WL 672820, at *12. That Notice Program, which is currently being implemented, meets and exceeds all legal requirements. Supplementing the comprehensive individual notice and concurrent media plan for the contemporaneous 3.0-liter Settlement, the Notice Program also included direct First Class U.S. Mail mailings to confirmed addresses of Class Members, as well as email notifications; extensive print and digital media campaigns; and a comprehensive website and a toll-free telephone number. To quantify the scope and scale of the Notice Program: (a) 949,563 Short Form Notices have been directly mailed to

Class Members; (b) 855,240 Email Notices have been sent to Class Members; (c) the informational release has been issued to 5,000 print and broadcast and 5,400 online press outlets throughout the United States; and (d) more than 4,152 sponsored search listings have been placed on Google, Yahoo! and Bing.

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Publication and other notice techniques are sufficient where individual notice to the Class is impractical. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Incorporating both direct and indirect notification methods, and with the benefit of the extensive notice done in the Volkswagen Settlements, the Notice Program here takes every reasonable step to ensure no Class Member is unaware of the Settlement. The ongoing implementation of the Notice Program is fully consistent with this Court's Preliminary Approval Order.

In conjunction with preliminary approval, the Court analyzed the content of the Long-Form Notice and the Short Form Notice in light of the requirements of Rule 23(c)(2)(B), and determined that they "satisfy the elements" of that Rule. *In re Volkswagen*, 2017 WL 672820, at *13. As Plaintiffs demonstrated in seeking preliminary approval of the Settlement, the Long Form Notice explains how Class Members may object to, or opt out of, the Settlement, and how Class Members may address the Court at the final approval hearing. It includes a series of questions and answers designed to explain the benefits and other details of the Settlement in clear terms in a well-organized and reader-friendly format. It also identifies by name and furnishes contact information for Lead Plaintiffs' Counsel and PSC members who can answer Class Members' questions, and indicates that additional information about the Settlement can be found on the Settlement Website (https://www.boschvwsettlement.com) or by calling the toll-free telephone number (1-844-305-1928) specifically established to provide Class Members with additional information about the Settlement and to answer any questions they may have about the Settlement. The Email Notice contains information in easily digestible bullet-point format that advises class members of the compensation under the Settlement, deadlines for objecting to and

opting out of the Settlement, deadlines for filing a claim in the Bosch Settlement in the event class members exclude themselves from the Volkswagen Settlement(s), and the date of the Final Approval Hearing. It also directs class members to the Settlement Website and the toll-free telephone number for more information. The Short Form Notice conveys the basic structure of the Settlement and was designed to capture Class Members' attention with clear, concise, plain language.

In addition to direct mailings, emails, and print and broadcast informational releases, a digital campaign focused on stimulating awareness about the Settlement and encouraging Class Members' participation in the Settlement has been implemented. Each form of notice was designed to assist Class Members in obtaining full details of the Settlement by directing them to the Settlement Website and/or the toll-free telephone number. All of the relevant background information and the Settlement documents (including the Long Form Notice and the Claim Form) have been made available through both the Settlement Website and the toll-free telephone number. The interactive Settlement Website currently allows Class Members to run a vehicle look-up by VIN number to determine their eligibility to participate in the Settlement. The Settlement Website will post periodic updates as additional information becomes available, and as the claims process opens, in order to facilitate Class Members' claim submissions. A final report on the completion of the Notice Program, including updating of addresses for returned mail, will be submitted by Declaration from the Court-appointed notice provider as part of the April 28, 2017, reply submissions.

As discussed above, direct mail notice to Class Members remains the gold standard for adequate class-wide notice under Rule 23(b)(2)(C), Rule 23(e)(1), and principles of due process. Here, all addresses gathered in the Volkswagen Settlements were used, to assure delivery of notice, and many Class Members received multiple notices. Indeed, the majority of the Class Members received e-mail notice, as well as U.S. mail notice. The other forms of notice implemented in this case, including publication and email notice, ordinarily suffice even absent direct notice by mail. *See, e.g.*, *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 449 (C.D. Cal. 2014) (approving notice by

publication in *USA Today* and issuing final approval of settlement where "[t]he notice clearly apprises class members of the action and of their legal options."); *In re Netflix Priv. Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9 (N.D. Cal. Mar. 18, 2013) (approving notice by email and publication and issuing final approval of settlement). The Notice Program being implemented in this case far surpasses the applicable legal requirements and ensures that all Class Members will receive adequate notice of the Settlement and an opportunity to object to, or opt out of, the Settlement.

VII. CONCLUSION

For the foregoing reasons, Settlement Class Representatives and Settlement Class Counsel respectfully request that the Court confirm the certification of the Settlement Class and grant final approval to the Settlement.

Dated: March 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2017, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ *Elizabeth J. Cabraser*
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